

Is the rule of law too vague a notion?

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In December, the European Commission triggered the so-called Article 7(1) TEU procedure against Poland on the grounds that “there is now a clear risk of a serious breach of the rule of law”. If a ‘serious breach’ persists for some time, the sanctioning mechanism of Article 7(2) TEU suspends certain rights of that country in the Council, including the voting rights. The Commission sent a reasoned opinion to the Council laying out the case that Poland poses a serious threat to the rule of law, triggering a battle over whether the EU has the power to criticize the judicial “reforms” (as the Polish government calls them) of a Member State.

In urging the Council to find that there is a clear risk of a serious breach of the rule of law in Poland (there is no question of sanctions at this stage which may be only considered in the case of “the existence of a serious and persistent breach”), the Commission pointed to the fact that Poland packed its Constitutional Tribunal with judges whose election violated the Polish Constitution, restricted the operation of the Constitutional Tribunal in unconstitutional ways and refused to publish the decisions of the Constitutional Tribunal that found against the government on these matters. As the Commission noted, Polish authorities also attacked the ordinary judiciary by adopting “reforms” which enable the ruling party to fire without cause all ordinary court presidents, dismiss almost 40 per cent of the current Supreme Court judges through the trick of changing the judicial retirement age (while giving the national President the unfettered discretion to retain those judges he liked); alter the composition of the National Council of the Judiciary so that the appointment of new judges would be made by reliable government allies; and permit all cases decided in the past 20 years to be reopened by any interested party and then re-decided by the courts that now contain the new government-approved judges. As the Commission stated, “[t]he common pattern is that the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch.”

The tone of the Commission’s opinion is measured and factual, and yet it should cause alarm among all those interested in the future of Europe. The Commission makes its case for action only on the basis of those measures that have been taken already, not on hypothetical or proposed attacks that might materialise off in some imagined future. The Commission builds a powerful argument that the rule of law has already been undermined in Poland as the government fires judges and controls the new judicial appointments, after it has already reduced the Constitutional Tribunal to a rubber stamp for one-party rule. Given the evidence that the Commission presents, one would surmise that we had already moved well beyond the “clear risk of a serious breach” into the breach itself. But EU institutions are slow; they are still at the stage of documenting and certifying the risk that such breach might occur. And yet even with this modest action in the face of continuing provocation, the Commission has been attacked for intruding on the protected competencies of national authorities.

In this post and a number of forthcoming ones, we aim to give readers a straightforward overview of the problem of the rule of law in the EU. We present the arguments put forward by those who reject EU intervention and show why they fail. But while we want to defend the move to trigger Article 7(1) TEU, we also believe that the EU institutions have not yet fully risen to the challenge. So we also present critiques of what the EU institutions have done to date. To accomplish these purposes, we offer 10 Questions & Answers on the rule of law in the EU.

Question 1: Is the rule of law too vague a notion to be enforced by the EU against its Member States?

Discussing possible sanctions against Poland over its rule of law issues, the Bulgarian prime minister recently claimed that the rule of law is too “vague” to be measured before adding: “Every time you want to hurt someone’s feelings, you put [on the table] ‘the rule of law’.” The argument that the rule of law is a vague, elusive or trivial concept is not new. To give a single example, in 2007, the UK House of Lords itself concluded that the rule of law “remains a complex and in some respects uncertain concept” notwithstanding its inclusion in the British statute book in 2005.

In the EU legal framework, the rule of law is explicitly mentioned as a value which is common to the EU and its Member States (see Article 2 TEU). It is also referenced as a principle which the EU ought to promote in its external action (see Article 21 TEU). The EU Treaties do not, however, provide a definition, which is not unique to this concept. Indeed, most national constitutions that refer to the rule of law do not provide any definition either. This does not necessarily imply that the rule of law is inevitably vague.

As a matter of fact, the European Commission offered a compelling working definition of the rule of law in 2014, which itself closely reflects the definition proposed by the Council of Europe’s Venice Commission in 2011. For the European Commission, there is a broad consensus on the core meaning of the rule of law which entails compliance with the following six legal principles: legality; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for human rights and finally, equality before the law.

While the European Commission accepted that “the precise content of the principles and standards stemming from the rule of law may vary at national level”, its understanding of the rule of law makes clear that the core elements remain the same. Similarly compelling is the Commission’s view that the rule of law must be understood as a “constitutional principle with both formal and substantive components” and also one which “is intrinsically linked to respect for democracy and for fundamental rights.”

Arguing that the rule of law is too elusive to be relied upon by the EU omits its long-established use in the context of EU enlargement policy (see Chapters 23 and 24 of the EU’s *acquis*), where it has been used as a standard against which to measure the progress of accession states. Arguing that the rule of law cannot be measured similarly omits the many rule of law measurement indexes or checklists which currently exist (see for instance the 2016 Venice Commission’s Rule of Law checklist recently endorsed by the

Parliamentary Assembly of the Council of Europe). Coming from the Bulgarian prime minister, this vagueness critique was all the more surprising considering that Bulgaria has been subject to a special rule of law monitoring mechanism since 2007, in the context of which a number of explicit and specific benchmarks were adopted. Among them, one may mention the need to adopt constitutional amendments to remove “any ambiguity regarding the independence and accountability of the judicial system.”

We might note that many important principles of law have solid cores that can be legally enforced even if there is disagreement about where the boundary is at the margins. The right to “free speech” surely includes the idea that the state may not punish the political opposition for criticising the government even if there is no unanimity about whether hate speech may be legally prohibited. The right to data privacy surely includes the requirement that the state may not as a general matter indiscriminately collect private information even if there is no unanimity about how far this right gives way in the immediate aftermath of a terrorist attack. Most general principles have clear cores and contestable margins, and it is no argument against the existence of the clear core that one can imagine cases at the margins over which one can reasonably argue.

It would be therefore wrong in our view to argue that there is no such thing as the rule of law or that this principle would be too open-ended to be enforced by the EU. The EU Commission should be commended for adopting a working definition of the rule of law in 2014 and imposing benchmarks as well as making specific recommendations. This is not to say that definitions or indexes are the miracle cure when it comes to monitoring and guaranteeing a country’s adherence to the rule of law. Holistic and contextual assessments remain essential to detect the first signs of what we call rule of law backsliding. But there is no reasonable doubt about what the backsliding is from.

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